

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

APPLE, INC.,) CV-10-3216-JF
)
PLAINTIFF,) SAN JOSE, CALIFORNIA
)
VS.)
) APRIL 1, 2011
EFORCITY CORPORATION, ET)
AL,)
) PAGES 1-13
DEFENDANT.)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JEREMY FOGEL
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: KILPATRICK TOWNSEND STOCKTON
BY: THEODORE HERHOLD
379 LYTTON AVENUE
PALO ALTO, CA 94301

FOR THE DEFENDANT: LEWIS BRISBOIS BISGAARD & SMITH
BY: JON HOKANSON
221 N. FIGUEROA STREET
SUITE 1200
LOS ANGELES, CA 90012

OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

1 SAN JOSE, CALIFORNIA APRIL 1, 2011

2 P R O C E E D I N G S

3 (WHEREUPON, COURT CONVENED AND THE
4 FOLLOWING PROCEEDINGS WERE HELD:)

5 THE COURT: THE CALENDAR SEEMS TO HAVE
6 SHRUNK.

7 LET ME TAKE FIRST THE APPLE VERSUS
8 EFORCITY MATTER.

9 MR. HERHOLD: GOOD MORNING, YOUR HONOR.
10 TED HERHOLD REPRESENTING APPLE.

11 MR. HOKANSON: GOOD MORNING, YOUR HONOR.

12 JON HOKANSON REPRESENTING THE EFORCITY
13 DEFENDANTS, SPECIFICALLY NAMED EFORCITY, ITRIMMING,
14 ACCSTATION AND EVERYDAYSOURCE.

15 THE COURT: GOOD MORNING.

16 WELL, I THINK THE MOTION TO STRIKE HAS
17 BEEN RESOLVED. THE MOTION TO DISMISS I THINK OUR
18 LOCAL RULES ADDRESS THE CONCERNS THAT THE DEFENDANT
19 HAVE ABOUT NOTICE.

20 APPLE IS GOING TO BE REQUIRED TO SET
21 FORTH VERY SPECIFIC INFRINGEMENT CONTENTIONS AND
22 THEY'RE NOT GOING TO BE ABLE TO AMEND THEIR CLAIMS
23 OR EXPAND THEIR CLAIMS WITHOUT MAKING A NOTICED
24 MOTION.

25 SO I THINK THE NOTICE ISSUES THAT THE

1 DEFENDANT IS RAISING ARE ADDRESSED. SO THAT WOULD
2 BE MY INCLINATION, UNLESS YOU HAVE A DIFFERENT
3 VIEW, COUNSEL.

4 MR. HOKANSON: I BELIEVE I DO, AND MAY I
5 BE HEARD?

6 THE COURT: PLEASE. THAT'S WHY WE ARE
7 HERE.

8 MR. HOKANSON: I WOULD LIKE TO ADDRESS
9 SPECIFICALLY THE UTILITY ASPECTS OF THIS AND SOME
10 OF THE LARGER QUESTIONS THAT THIS CASE PRESENTS,
11 AND PARTICULARLY HOW YOU RULE ON THE WAY THE
12 PLEADINGS ARE GOING TO BE SHAPED AND THE IMPACT
13 THEY HAVE ON THESE LARGER QUESTIONS.

14 THIS CASE WAS FILED JULY 22ND AGAINST THE
15 VARIOUS DEFENDANTS. THERE WAS NO NOTICE PROVIDED.
16 THEY ALL RELATE TO APPLE ACCESSORY PRODUCTS. NONE
17 OF THOSE PRODUCTS HAD PATENT MARKINGS.

18 THE COMPLAINT WAS NOT SERVED ON THE
19 DEFENDANT. THE EFORCITY DEFENDANTS LEARNED ABOUT
20 THIS CASE THROUGH INFORMAL MEANS, ATTEMPTED TO CALL
21 THE APPLE IN-HOUSE ATTORNEYS AND THEY IMMEDIATELY
22 TOOK ALL THE ACCUSED PRODUCTS OFF THE MARKET. SO
23 WITHIN A MATTER OF SEVERAL DAYS ALL PRODUCTS WERE
24 OFF THE MARKET.

25 WE HAVE A TOTAL DOLLAR VALUE OF TOTAL

1 SALES FOR THIS CASE FOR WHICH LIABILITY FOR DAMAGES
2 IS SOMEWHERE IN THE VERY LOW SIX FIGURE NUMBER.

3 IF YOU ASSIGN SOME GENEROUS LOSS PROFITS
4 VALUE OR REASONABLE ROYALTY VALUE OF 25 TO 50
5 PERCENT, THIS CASE, THE MONEY AMOUNT WOULD NOT EVEN
6 REACH THE JURISDICTIONAL AMOUNT FOR DIVERSITY CASE.

7 THE COURT: IT SOUNDS LIKE MAYBE, I DON'T
8 MEAN TO CUT OFF YOUR LEGAL ARGUMENT, BUT IT SOUNDS
9 LIKE MAYBE THE MOST EFFICIENT THING TO DO WOULD BE
10 TO INITIATE SOME TYPE OF DISPUTE RESOLUTION.

11 MR. HOKANSON: WELL, WE'VE TRIED AND
12 THAT'S GOING ON A SEPARATE TRACK.

13 AS THE NEXT POINT I'M ABOUT TO MAKE IS
14 FROM DAY ONE IT'S MY UNDERSTANDING THAT THE
15 EFORCITY DEFENDANTS TRIED TO SETTLE THIS CASE AND
16 AS SOON AS WE WERE BROUGHT IN WE HAVE BEEN TRYING
17 SETTLE THE CASE FROM DAY ONE, IT'S BEEN OVER EIGHT
18 MONTHS AGO.

19 OF ALL THE VARIOUS FACTORS AND PROPOSALS
20 TRADED BACK AND FORTH, THE ONE THAT'S PERHAPS THE
21 MOST SIGNIFICANT FOR THE LARGER QUESTION HERE IS
22 APPLE'S CONTINUED UNYIELDING ASSISTANCE THAT
23 JUDICIAL ADMISSIONS OF INFRINGEMENT OF ALL OF THE
24 CLAIMS OF ALL OF THE PATENTS AND ADMISSION OF
25 VALIDITY OF ALL OF THE CLAIMS OF ALL THE PATENTS BE

1 PART OF THE SETTLEMENT.

2 MR. HERHOLD: YOUR HONOR, I JUST --

3 MR. HOKANSON: THOSE PATENTS ARE GOING TO
4 EXPIRE AROUND 2024 TO 2025.

5 AND WHAT WE'VE GOT HERE IS A SITUATION
6 NOW WHERE IN ORDER TO GET OUT OF THIS CASE FOR A
7 RELATIVELY SMALL AMOUNT OF MONEY, THERE'S GOING TO
8 HAVE TO BE SERIOUS SUPPRESSION TO OUR CLIENT'S
9 ABILITY TO ENTER THE MARKET.

10 THE COURT: OKAY.

11 I SUSPECT COUNSEL WAS GOING TO OBJECT
12 THAT YOU WERE GETTING INTO SETTLEMENT DISCUSSIONS.

13 MR. HERHOLD: ABSOLUTELY, YOUR HONOR.

14 THE COURT: BUT MY POINT IS SO FAR WHAT
15 I'M HEARING IS THAT THE PRACTICAL EFFECT OF HAVING
16 TO LITIGATE THIS CASE, THE WAY PATENT CASES TEND TO
17 BE LITIGATED IS SO COST INEFFECTIVE FOR YOUR CLIENT
18 AND SO UNRELATED TO THE AMOUNT THAT APPLE COULD
19 ULTIMATELY RECOVER THAT YOU ARE LOOKING FOR SOME
20 PROTECTION FROM THE COURT BASICALLY TO PREVENT THAT
21 TYPE OF THING FROM OCCURRING.

22 I'M STILL BACK ON THE QUESTION OF WHAT
23 NEEDS TO BE SET OUT IN A COMPLAINT FOR PATENT
24 INFRINGEMENT?

25 AND I THINK THE ELEMENTS, AT LEAST THE

1 WAY THAT THEY HAVE BEEN APPLIED IN THIS DISTRICT,
2 ARE THERE. YOU'VE INDICATED THE PATENTS, YOU'VE
3 INDICATED THE CLAIMS IN THE PATENTS THAT ARE
4 ALLEGEDLY INFRINGED.

5 AND THEN UNDER THE LOCAL PATENT RULES
6 IT'S THE OBLIGATION OF THE PLAINTIFF TO SET FORTH
7 WITH PARTICULARITY WHAT THEIR INFRINGEMENT
8 CONTENTIONS ARE.

9 SO UNDER 12(B)(6) I'M STILL -- I'M
10 HEARING A LOT OF PRACTICAL REASONS WHY YOU WANT THE
11 COURT TO STOP THE TRAIN HERE, BUT I'M NOT SURE THAT
12 MEANS I WOULD HAVE TO GRANT A 12(B)(6) MOTION.

13 MR. HOKANSON: I HEAR YOU, YOUR HONOR,
14 AND YES.

15 BUT AS WE ARE GETTING INTO SOME OF THE
16 OTHER POINTS, THE COURT MIGHT NOT BE AWARE OF THE
17 RULE 11 MOTION WE HAVE ON FILE THAT'S SCHEDULED TO
18 BE HEARD ON THE 6TH OF MAY.

19 THE COURT: OKAY.

20 MR. HOKANSON: THERE'S SOME OVERLAPPING
21 ISSUES, THERE'S SOME CROSSOVER ISSUES RELATED TO
22 THAT MOTION. AND ONE OF THE REQUESTS I HAVE, ONE
23 OF THE LARGER ISSUES HERE IS FOR YOU TO DEFER YOUR
24 RULING ON THIS MOTION UNTIL YOU'VE BEEN FULLY
25 INFORMED OF ALL THE INPUTS IN RELATION TO BOTH

1 MOTIONS.

2 I'M NOT GOING TO PRE ARGUE THE RULE 11
3 MOTION, WE HAVEN'T EVEN SEEN APPLE'S OPPOSITION
4 YET, BUT THAT'S FAIRLY STRAIGHTFORWARD AND DOES
5 HAVE A SIGNIFICANT SPILLOVER EFFECT IN THIS MOTION
6 IN TERMS OF WHAT IS A REASONABLE INVESTIGATION IN
7 ORDER TO PUT FORTH STATEMENTS OR ALLEGATIONS IN A
8 COMPLAINT?

9 SO THAT'S POINT ONE. IF YOU WOULD SIMPLY
10 DEFER YOUR RULING ON THIS MOTION UNTIL YOU HAVE
11 BEEN FULLY INFORMED, THAT WOULD BE VERY, VERY
12 HELPFUL.

13 THE COURT: ALL RIGHT.

14 MR. HOKANSON: NOW MOVING ON TO THE NEXT
15 LARGE ISSUE. IT'S BASICALLY LEVERAGE, A PRACTICAL
16 ISSUE.

17 AND THAT IS IF THIS CASE PROCEEDS, IT'S
18 QUITE APPARENT THAT IT'S NOT COST EFFECTIVE FOR
19 THIS PARTICULAR CLIENT TO GO FORWARD WITH DEFENDING
20 ALL 230 CLAIMS OR SOME NUMBER LESS THAN 230 BUT
21 GREATER THAN 10.

22 SO WHAT'S THE LEVERAGE EFFECT HERE THAT
23 APPLE GETS ON THE STRENGTH OR THE BASIS OF ALLEGING
24 TEN CLAIMS THEY ARE GOING TO HAVE JUDGMENTS THAT
25 PROTECT AGAINST INFRINGEMENTS NOT AGAINST THESE

1 SPECIFIC PRODUCTS BUT AGAINST ANY SO CALLED
2 INFRINGEMENT OR COLORABLE VARIATION THEREOF,
3 ET CETERA, ET CETERA

4 THE COURT: YOU ARE ACTUALLY SPEAKING TO
5 A SYMPATHETIC AUDIENCE IN TERMS OF THE WAYS THAT
6 PATENT LITIGATION IS USED STRATEGICALLY BUT I'M
7 STILL NOT SURE THEY HAVEN'T MET THE REQUIREMENTS OF
8 RULE 12.

9 I MEAN, I WOULD LIKE TO GET COUNSEL'S
10 RESPONSE ON THE OTHER REQUEST YOU MADE, BUT I'M --
11 HOW IS THIS COMPLAINT DEFICIENT IN TERMS OF GIVING
12 YOU NOTICE OF WHAT YOU'RE REQUIRED TO GET UNDER
13 RULE 8, PARTICULARLY GIVEN THAT WE'VE GOT VERY
14 ELABORATE RULES IN OUR DISTRICT FOR GIVING MORE
15 PARTICULARITY.

16 MR. HOKANSON: WELL, WITH RESPECT TO THE
17 DESIGN PATENTS AFTER RE LOOKING AT THE PAPERS
18 FILED, WE WOULD CONCEDE ON THE DESIGN PATENTS.

19 THE COURT: OKAY.

20 MR. HOKANSON: WITH RESPECT TO THE
21 UTILITY PATENTS, WE MAINTAIN OUR POSITION.

22 NOW WE HAVE NOT FOUND ANY CASE THAT'S
23 SPECIFICALLY ON POINT TO THESE FACTS. AND I DIDN'T
24 SEE ANY IN THE PLAINTIFF'S PAPERS EITHER.

25 SO WE OBVIOUSLY ARE IN A SITUATION WHERE

1 WITHIN YOUR DISCRETION, AND THE CASE PROVIDES SOME
2 GUIDANCE, SO YOU CAN DO WHAT YOU WANT. BUT --

3 THE COURT: I'VE GOT YOU, I'VE GOT YOU.

4 MR. HOKANSON: BUT MY POINT IS YOU ARE
5 GOING TO MAKE A RULING SOONER OR LATER ON WHAT THE
6 PLEADINGS LOOK LIKE.

7 AND IN ORDER TO PROPERLY MAKE THE RIGHT
8 RULING CONSIDERING ALL THE FACTORS, PARTICULARLY
9 THE RULE 11 FACTORS, WE THINK IT'S IMPORTANT NOT TO
10 MAKE A RULING ON THE RULE 12 NOW, AND THAT WHAT YOU
11 WILL SEE IN THE NEXT SEVERAL MONTHS MAY AFFECT
12 WHAT YOU'RE GOING TO DO WITH THE RULE 12 MOTION.

13 THE COURT: I'M HEARING YOU.

14 YOU'RE MAKING A CASE MANAGEMENT REQUEST.
15 I WILL TAKE THAT SERIOUSLY AND I WOULD LIKE TO HEAR
16 COUNSEL'S RESPONSE TO IT.

17 BUT BEFORE I DO, WITHOUT GETTING INTO THE
18 SUBSTANCE OF THE DISCUSSIONS, HAVE ALL OF THE
19 EFFORTS TO TRY TO RESOLVE THE CASE BEEN BETWEEN THE
20 PARTIES OR HAVE YOU ACTUALLY USED A THIRD PARTY?

21 MR. HOKANSON: WE HAVE NOT USED A THIRD
22 PARTY. I BELIEVE WE ARE ON TRYING TO USE A THIRD
23 PARTY.

24 SEVERAL DAYS AGO I SENT THE ADR REQUEST
25 FORM TO MR. HERHOLD.

1 THE COURT: WHAT'S YOUR CLIENT'S
2 PREFERENCE AS TO WHAT TYPE OF ADR TO USE?

3 MR. HOKANSON: IN-PERSON MEETING BEFORE A
4 MAGISTRATE JUDGE.

5 THE COURT: OKAY. ALL RIGHT.
6 MR. HERHOLD, YOUR RESPONSE TO ANY OF THE POINTS?

7 MR. HERHOLD: WELL, YOUR HONOR, THANK
8 YOU.

9 WE ARE CERTAINLY WILLING TO CONTINUE
10 SETTLEMENT NEGOTIATIONS, THE PARTIES HAVE
11 THROUGHOUT.

12 BUT WITH REGARD TO THE MOTION TO DISMISS,
13 WE WOULD LIKE A RULING ON THAT TODAY. IT WAS A
14 MOTION THAT THEY FILED. THEY SET IT FOR HEARING
15 TODAY. WE FILED THE OPPOSITION, THEY WANTED TO GO
16 FORWARD WITH THE HEARING.

17 WE THINK IT WOULD BE PRUDENT AND
18 EXPEDITIOUS TO GO AHEAD AND GET A RULING ON THE
19 MOTION TO DISMISS. WE THINK WE MET ALL OF OUR
20 PLEADING REQUIREMENTS.

21 SO WITH RESPECT TO THE RULE 11 MOTION, WE
22 HAVEN'T HAD AN OPPORTUNITY TO OPPOSE THAT. BUT
23 AGAIN, WE WOULD JUST SAY IT'S REALLY PIVOTING OFF
24 THIS RULE 12(B)(6) MOTION WHICH IS SAYING WELL, WE
25 DIDN'T ADEQUATELY PLEAD PATENT INFRINGEMENT

1 THEREFORE WE MUST NOT HAVE DONE AN ADEQUATE
2 INVESTIGATION.

3 THAT'S WHAT THE RULE 11 MOTION IS.

4 YOU KNOW I'M NOT GOING GET INTO THE
5 MERITS OF THAT, BUT IT'S COMPLETELY PREMATURE.

6 THEY CITE THE VIEW ENGINEERING, INC.
7 CASE WHICH WAS AFTER DISCOVERY, ET CETERA, AFTER
8 THE PLAINTIFF DISMISSED THE CASE. SO EVEN THAT
9 MOTION IS VERY MUCH PREMATURE.

10 THE COURT: I THINK -- I MEAN THE PICTURE
11 I'M GETTING IS THAT THIS PARTICULAR FIGHT THIS
12 MORNING IS REALLY ABOUT SOMETHING ELSE OTHER THAN
13 THE PLEADINGS.

14 BUT LET ME SEE IF CAN HELP. DIANA, WHO
15 IS THE MAGISTRATE ON THIS?

16 THE CLERK: JUDGE LLOYD.

17 THE COURT: OKAY.

18 I THINK I'M ACTUALLY GOING TO ASSIGN IT
19 TO JUDGE GREWAL. I HOPE HE DOESN'T HAVE A
20 CONFLICT.

21 FORTUNATELY, ONE OF OUR MAGISTRATE JUDGES
22 HAS MANY YEARS AS A PATENT LITIGATOR AND HE WOULD
23 BE A PERFECT PERSON FOR YOU TO TALK WITH.

24 SO I'M GOING TO REFER YOU TO HIM -- I
25 WILL RULE ON THE MOTION SHORTLY, EITHER TO DEFER IT

1 OR TO PUT IT ASIDE ON THE MERITS.

2 BUT IN THE MEANTIME, WHY DON'T YOU GO
3 DOWN TO THE FOURTH FLOOR, GET THE EARLIEST DATE ON
4 JUDGE GREWAL'S SETTLEMENT CALENDAR THAT YOU CAN.
5 OKAY?

6 MR. HOKANSON: ALL RIGHT. THANK YOU,
7 YOUR HONOR.

8 MR. HERHOLD: THANK YOU, YOUR HONOR.

9 THE COURT: MATTER SUBMITTED.

10 (WHEREUPON, THE PROCEEDINGS IN THIS
11 MATTER WERE CONCLUDED.)
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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT
REPORTER OF THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY.

SUMMER A. FISHER, CSR, CRR
CERTIFICATE NUMBER 13185